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***‘Wish You Weren’t Here...’***

***New Models of Social Solidarity in the European Union***

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I. INTRODUCTION:

THE EUROPEAN UNION AS A MULTI-LEVEL WELFARE SYSTEM

It is trite to observe that, even though responsibility for welfare provision remains primarily in the hands of the Member States, Community law nevertheless has a significant impact upon the domestic systems of social protection. Indeed, we have grown used to the idea that the European Union now constitutes a multi-level welfare system characterised by a complex combination of local, national and Community policies. This is sometimes expressed in the notion that the Member States are now ‘semi-sovereign welfare states’ whose choices about how to provide for the social well-being of their own citizens are increasingly constrained *not only* by obvious factors such as the demographic pressures posed by an aging population and the need to compete within the globalising economy *but also* by the pervasive influence of the Union – which has not, however, evolved into a ‘newly sovereign welfare state’

determining for itself the conditions under which we pay taxes and receive benefits.<sup>1</sup> As a result, the idea of social solidarity can no longer be treated simply as a national or local monopoly. It also has a vital Community component.<sup>2</sup>

When analysing this Community component, it is perhaps inevitable that the Union lacks either any clear organising concept of social solidarity for itself, or any coherent approach to those national concepts of welfare provision with which it must interface.<sup>3</sup> Instead, social solidarity trickles through different Treaty provisions in different forms and in different ways – creating a veritable kaleidoscope of welfare rights and principles.

Within this kaleidoscope, it is tempting to focus on the Community's contribution to multi-level social solidarity in *negative terms*, that is, how far the core Treaty provisions on economic policy threaten national choices about social protection. For example, domestic structures for the delivery of welfare benefits and

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\* University of Liverpool and University of Birmingham (respectively). We are very grateful to participants at the Cambridge *Social Welfare* conference (June 2003) for their helpful comments.

<sup>1</sup> In particular: S Leibfried and P Pierson, 'Social Policy: Left to Courts and Markets?' in H Wallace and W Wallace (eds), *Policy-Making in the European Union* (OUP, 2000).

<sup>2</sup> And, of course, an important international component: consider, eg the European Convention on Social and Medical Assistance (11 December 1953), the European Social Charter (18 October 1961) and the Revised European Social Charter (3 May 1996). On the Council of Europe's international instruments concerning social protection, and their potential (indirect) relevance within an EU legal context (thanks to Art 34 Charter of Fundamental Rights of the European Union, OJ 2000 C364/1), see further: J Tooze, 'Social Security and Social Assistance' in T Hervey and J Kenner (eds), *Economic and Social Rights Under the EU Charter of Fundamental Rights: A Legal Perspective* (Hart Publishing, 2003).

<sup>3</sup> In this regard, the new Constitutional Treaty, for all its references to solidarity, seems unlikely *of itself* to herald any greater coherence.

services may be found to act as barriers to the effective operation of the Internal Market (under the provisions concerning the free movement of goods or services, and also the rules on competition law or state aids) and thus require objective justification under the appropriate public interest derogations.<sup>4</sup> National welfare choices are also put under more indirect types of pressure by the process of European economic integration. For example, free movement might act as an invitation for undertakings to engage in social dumping, inspired by differences in the contributions and general taxation intended to fund national social security systems, in turn tempting the Member States to engage in a destructive cycle of regulatory competition which will eventually undermine high standards of welfare protection.<sup>5</sup> Moreover, there are concerns that the Growth and Stability Pact intended to consolidate the final stage of monetary union may have a negative impact upon the financing and planning of the domestic social protection systems, when Member States prefer cutting back on welfare expenditure (rather than increasing taxes) as a means of meeting the excessive budget deficit threshold of 3% GDP.<sup>6</sup>

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<sup>4</sup> Consider, in particular, the effect of Art 49 EC on health care provision: eg Case C-158/96 *Kohll v Union des Caisses de Maladie* [1998] ECR I-1931; Case C-368/98 *Abdon Vanbreakel and others v Alliance nationale des mutualités chrétiennes* [2001] ECR I-5363; Case C-157/99 *B S M Garaets-Smits v Stichting Ziekenfonds VGZ and Peerbooms v Stichting CZ Groep Zorgverzekeringen* [2001] ECR I-5473; Case C-385/99 *Müller Fauré v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA*, and *van Riet v Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen* [2003] ECR I-4509; Case C-56/01 *Patricia Inizan v Caisse primaire d'assurance maladie des Hauts-de-Seine* [2003]. ECR I-0000

<sup>5</sup> Eg L Delsen, N van Gestel and J van Vugt, 'European Integration: Current Problems and Future Scenarios' in J van Vugt and J Peet (eds), *Social Security and Solidarity in the European Union* (Physica-Verlag, 2000).

<sup>6</sup> See the contribution of Mica Panic in this collection.

Against that background, the Union has often been accused of suffering from a form of ‘constitutional asymmetry’: the legal tools employed in pursuit of economic efficiency far outweigh those available in the cause of social justice – and have the potential to ride roughshod over the complex bargains struck by domestic actors in the exercise of their residual welfare competences.<sup>7</sup> However, the kaleidoscope is much more nuanced than this analysis would suggest. In fact, Community law also makes a significant *positive contribution* to social provision within the European Union. Indeed, one can identify the emergence of new and peculiarly supranational models of solidarity which support and supplement (rather than threaten or undermine) the domestic welfare states. This chapter will focus upon one aspect of this dynamic contribution: the rights to free movement and equal treatment enjoyed by Union citizens who visit another Member State on a temporary basis. In particular, we will investigate how far such individuals should be entitled to claim access to welfare benefits provided by the host society on the same terms as own nationals or other lawful residents – and what sort of legal framework is emerging from the Court of Justice and the Community legislature to address this controversial issue.

Many commentators champion the evolution of a ‘European social citizenship’, whereby the process of ‘ever closer union’ encourages novel expectations of social solidarity based upon the shared identity of Union citizenship. In the absence of extensive redistributive or harmonising competences in the sphere of welfare provision, the most effective mechanism by which the Community might realise such ambitions is by employing the principle of equal treatment to guarantee that migrant Union citizens are assimilated into the social protection systems of their

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<sup>7</sup> Eg B Schulte, ‘The Welfare State and European Integration’ (1999) 1 EJSS 7; F Scharpf, ‘The European Social Model: Coping With the Challenges of Diversity’ (2002) 40 JCMS 645.

host societies. However, this process of assimilation directly challenges the traditional link between an individual's legitimate right to claim welfare support and her / his recognised membership of the Member State's own solidaristic community – thereby raising questions about how far the common bond of Union citizenship can really act as a substitute for accepted ties of belonging based upon nationality or economic contribution. While the Court has already defined the basic parameters of this challenge as regards resident but economically inactive migrant Union citizens, the legal situation seems more uncertain when it comes to Union citizens who are merely visiting another Member State on a temporary basis. We identify two main models which could provide the basis for future developments.

The first (and more orthodox) is an 'objective justification approach': *all* migrant Union citizens are entitled to claim equal treatment as regards *all* benefits falling within the material scope of the Treaty – thus forcing the host society *in every case* to defend restrictions on access to its social protection system, especially residency requirements, by reference to a valid public interest requirement and the principle of proportionality. The second (and more novel) is a 'comparability approach': temporary visitors should be entitled to equal treatment as regards benefits falling within the material scope of the Treaty *only* once it has been verified that they are in a comparable situation to own nationals and other lawful residents. In particular, when it comes to social benefits which represent an expression of solidarity by the domestic welfare community *towards its own members*, temporary visitors might well be found to be in a non-comparable situation; if that is the case any difference in treatment – including that arising from the application of a residency requirement – would not give rise to discrimination which the host state needs to justify. We will argue that the comparability approach has several significant

advantages over the objective justification model. Moreover, the relevance of this comparability approach is not diminished *even after* the adoption in spring 2004 of Directive 2004/38 on free movement for Union citizens, which purports to address – but in our view, only incompletely – the relationship between temporary visitors and the host state’s social assistance benefits.<sup>8</sup>

## II. SOCIAL SOLIDARITY: COMMUNITY AND MEMBERSHIP

Social solidarity, at least as it is understood in Europe, represents an assumption of welfare responsibilities between the members of a particular community. Solidarity systems are based, in particular, upon a principle of subsidisation: a proportion of the wealth generated or enjoyed by certain members of a group is placed at the disposal of public institutions in order to satisfy the social needs of other members of the group.<sup>9</sup>

*Solidarity* and *community* are in fact closely related concepts, and this is true for two main reasons. The first is primarily moral in nature. Social protection measures promote the redistribution of society’s wealth, contrary to the outcomes

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<sup>8</sup> Dir 2004/38 on the right of citizens and their family members to move and reside freely within the territory of the Member States, 2004 OJ L158/77.

<sup>9</sup> Consider, in particular, AG Fennelly in Case C-70/95 *Sodemare* [1997] ECR I-3395, para 29: social solidarity ‘envisages the inherently uncommercial act of involuntary subsidisation of one social group by another’. Similarly, eg A Winterstein, ‘Nailing the Jellyfish: Social Security and Competition Law’ [1999] ECLR 324; T Hervey, ‘Social Solidarity: A Buttress Against Internal Market Law?’ in J Shaw (ed), *Social Law and Policy in an Evolving European Union* (Hart Publishing, 2000); S O’Leary, ‘Solidarity and Citizenship Rights in the Charter of Fundamental Rights of the European Union’ in *Collected Courses of the Academy of European Law 2003* (forthcoming).

which would result from the free operation of market forces. Such redistributory policies, especially those offering non-contributory benefits and services paid for out of general taxation, are perceived as being ‘morally demanding’ (or perhaps ‘compelling’). They are thus dependent upon a diffuse sense of social solidarity, which is nevertheless sufficiently powerful to persuade people to engage in the necessary process of subsidisation, of the sort which only derives from the existence of a common identity, forged through shared social and cultural experiences, and institutional and political bonds.<sup>10</sup> The second reason is largely financial in character. The redistribution of wealth, particularly through the provision of non-contributory welfare benefits and services, also requires a realistic management of society’s available resources. The competent public authorities must strike a balance between the number of people potentially able to claim social support, and the number of people actually able to pay for it. After all, if demand for welfare benefits were to outstrip the revenues capable of supporting them, the financial balance of the solidarity system could be seriously jeopardised.<sup>11</sup>

This marriage between *solidarity* and *community*, compelled by the need to construct a moral argument capable of justifying subsidisation, and by the budgetary realities of matching welfare demand and supply, has begotten an important conceptual progeny of its own. It becomes necessary to identify precise parameters of *membership* – defining which individuals *belong* to the collectivity (and are thus

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<sup>10</sup> In particular, T Faist, ‘Social Citizenship in the European Union: Nested Membership’ (2001) 39 *Journal of Common Market Studies* 37. Also, eg G Majone, ‘The European Community Between Social Policy and Social Regulation’ (1993) 31 *Journal of Common Market Studies* 153.

<sup>11</sup> See further, on the conceptual foundations of social solidarity, K Tinga and E Verbraak, ‘Solidarity: An Indispensable Concept in Social Security’ in J van Vugt and J Peet (eds), *Social Security and Solidarity in the European Union* (Physica-Verlag, 2000).



entitled to stake claims to its welfare support), and which individuals are *excluded* from the collectivity (and therefore unable to make out a legitimate case for social protection). In other words, ‘the right of an individual to claim membership of a particular community is crucial if that individual is to gain access to a community’s collective welfare arrangements’.<sup>12</sup>

Social solidarity can represent a manifestation of this collective identity, and thus reflect its inherent thresholds of membership and belonging, at several different levels. The most important is the state. After all, the bonds of national identity and citizenship are inseparable from the diffuse sense of social solidarity which fuelled the evolution of the modern European welfare states, and continues to provide the moral backbone which supports and justifies their social protection systems.<sup>13</sup> But other levels of solidarity also play an important role: for example, local (such as welfare provision organised by the region or commune), functional (as with social protection schemes supported by employers and employees), or inter-generational (such as pensions systems whereby current workers contribute to the welfare needs of persons who have already retired). And also supranational – especially in a complex governance system such as the Union, which has the effect of ‘nesting’ individuals into several overlapping strata of collective political and cultural consciousness.<sup>14</sup> Within such a system, different ideas of ‘community’ can emerge – each carrying its own definitions of membership, and its own expectations of social solidarity. In

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<sup>12</sup> P Dwyer, *Welfare Rights and Responsibilities: Contesting Social Citizenship* (The Policy Press, 2000) p 187.

<sup>13</sup> Eg A P van der Mei, *Free Movement of Persons Within the European Community: Cross-Border Access to Public Benefits* (Hart Publishing, 2003) Ch 1.

<sup>14</sup> In particular, T Faist, ‘Social Citizenship in the European Union: Nested Membership’ (2001) 39 *Journal of Common Market Studies* 37.

particular, many commentators anticipate the consolidation of a 'European social citizenship', which will act as a counterweight to the traditional economic constitution embodied in the Internal Market, whereby the sense of identity and mutual responsibilities which derive from the nationality of a Member State are supplemented by a new bond, carrying its own welfare rights and obligations, based upon the common heritage accrued through the process of 'ever closer' integration.<sup>15</sup>

Of course, controversies can arise *within* any single level of solidarity about where best to pitch its own thresholds of belonging and exclusion. For example, at the domestic level, a refusal to recognise certain forms of welfare need can effectively exclude many individuals from membership of the solidaristic community; and indeed, national welfare systems can be organised in a manner which systematically discriminates against disadvantaged groups such as women, ethnic minorities and homosexuals.<sup>16</sup> Similarly, at the supranational level, when qualification for the status of Union citizen relies exclusively upon the claimant possessing the nationality of a Member State in accordance with the latter's own rules, it can be argued that long

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<sup>15</sup> On social citizenship and the role of Union citizenship, eg M Everson, 'The Legacy of the Market Citizen' in J Shaw and G More (eds), *New Legal Dynamics of European Union* (Clarendon Press, 1995); D O'Keeffe and M Horspool, 'European Citizenship and the Free Movement of Persons' (1996) XXXI *The Irish Jurist* 145; S Douglas-Scott, 'In Search of Union Citizenship' (1998) 18 *Yearbook of European Law* 29. For contextual discussion of the broader relationship between social citizenship and welfare provision in social policy theory, eg N Harris, 'The Welfare State, Social Security, and Social Citizenship Rights' in N Harris (et al eds), *Social Security Law in Context* (OUP, 2000).

<sup>16</sup> Though, of course, Community law can have a positive impact here, eg Dir 79/7 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, 1979 OJ L6/24; Dir 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ 2000 L180/22. Cf. Art 3(3) Dir 2000/78 establishing a general framework for equal treatment in employment and occupation, 2000 OJ L303/16.

term resident third country nationals are unfairly excluded from membership of the Union's own fledgling solidaristic community.<sup>17</sup> But more important for present purposes is the idea that controversies can also result from the interaction *between* different levels of solidarity, especially as regards relations between the Union and its Member States, thanks to the perennial question of competence: how might the Community actually go about fulfilling the novel expectations of social solidarity which many associate with the promotion of a 'European social citizenship'?

### III. FULFILLING EXPECTATIONS OF SUPRANATIONAL SOCIAL SOLIDARITY

One possibility can be discounted immediately: the idea that the Union should act as a federal welfare state, enjoying general tax-and-spend redistributive competences. It is true that the Union does undertake limited redistributive functions. Consider, for example, the common agricultural policy, which organises on a Community-wide scale a system of collective responsibility for the social needs of farmers, operating in blatant defiance of the economic demands of the market;<sup>18</sup> or the structural funds, whereby significant sums of money are transferred from the more to the less affluent countries and regions, in pursuit of greater economic and social cohesion.<sup>19</sup> Of course,

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<sup>17</sup> See recently, eg European Economic and Social Committee, *Opinion on Access to European Union Citizenship*, 2003 OJ C208/76. However, note the provisions of Dir 2003/109 concerning the status of third country nationals who are long term residents, 2004 OJ L16/44.

<sup>18</sup> Further, eg E Rieger, 'The Common Agricultural Policy: Politics Against Markets' in H Wallace and W Wallace (eds), *Policy-Making in the European Union* (OUP, 2000).

<sup>19</sup> Further, eg D Allen, 'Cohesion and Structural Funds: Transfers and Trade-Offs' in H Wallace and W Wallace (eds), *Policy-Making in the European Union* (OUP, 2000).

neither system of ‘Community solidarity’ is perfect. The CAP’s traditional focus upon price support for agricultural production has tended to benefit big agricultural holdings, particularly in northern Europe (though the 2003 reforms decoupling income support from agricultural production, and reducing direct income payments for larger farms, might help to make the system more equitable).<sup>20</sup> Meanwhile, the structural funds have long been criticised on the grounds that the sums involved are not large enough to make any serious contribution to the elimination of persistent regional disparities; and have in fact tended to benefit the rich rather than the poor even within recipient regions by alleviating the need to increase tax revenues.<sup>21</sup> But in any case, the CAP and structural funds are hardly precedents for any realistic prospect of the Union acquiring general competence to provide for the population’s social needs based upon classic risks such as unemployment, old age, illness or disability – and the reasons are not hard to find. Just as the bond of nationality constitutes an essential component of the diffuse sense of solidarity underpinning the Member States’ social protection systems, so the lack of any comparable sense of collective identity at the supranational level, strong enough to provide popular support for the construction of a genuine European welfare system, acts as a serious obstacle against the attribution of more far-reaching redistributive functions to the Union.<sup>22</sup> Put

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<sup>20</sup> In particular: Reg 1782/2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers, 2003 OJ L270/1.

<sup>21</sup> Eg, G Majone, ‘The European Community Between Social Policy and Social Regulation’ (1993) 31 *Journal of Common Market Studies* 153.

<sup>22</sup> Eg, M Rhodes, ‘Defending the Social Contract: The EU Between Global Constraints and Domestic Imperatives’ in D Hine and H Kassim (eds), *Beyond the Market: the EU and National Social Policy* (Routledge, 1998). Cf. M P Maduro, ‘Europe’s Social Self: The Sickness Unto Death’ in J Shaw (ed), *Social Law and Policy in an Evolving European Union* (Hart Publishing, 2000).

crudely: it is far from clear that Polish taxpayers would be prepared to pay for the unemployment benefits of French citizens living in France; or that Irish taxpayers would be happy to fund healthcare for Greek nationals residing in Greece.

Another possibility fares little better. In certain fields of social policy, such as labour law, the Community's activities are largely regulatory (rather than redistributive) in nature – and often involve the harmonisation of national laws, thus permitting the Community to promote common standards of social protection across the Member States. And indeed, the Treaty has been used to adopt certain harmonising measures directing the Member States about how to allocate their own welfare resources: consider, for example, Regulation 1408/71 on the cross-border coordination of the national social security systems;<sup>23</sup> Directive 79/7 on equal treatment between men and women as regards social security benefits;<sup>24</sup> and Directive 2003/8 establishing minimum common principles for legal aid in cross-border disputes, intended to facilitate access to justice for less well-off members of society.<sup>25</sup> But by-and-large, the scope for approximating national welfare rules is very limited. After all, the Treaty expressly precludes the adoption of harmonising measures to

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<sup>23</sup> Reg 1408/71 on the application of social security schemes to employed persons and their families moving within the Community (last consolidated version published at 1997 OJ L28/1). See now: Reg 883/2004 on the coordination of social security systems, 2004 OJ L200/1 (partially repealing and replacing Reg1408/71).

<sup>24</sup> Dir 79/7 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, 1979 OJ L6/24.

<sup>25</sup> Dir 2003/8 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, OJ 2003 L26/41. The Commission's original proposal was even more solidaristic in nature, since it would have covered not only cross-border but also wholly internal situations: COM(2002) 13 Final.

combat social exclusion or to modernise social protection for citizens other than workers; and requires that, in any case, Community action in the social sphere must not affect the right of Member States to define the fundamental principles and maintain the basic financial equilibrium of their own social security systems.<sup>26</sup> Those limitations on Community competence perhaps reflect more fundamental political and logistical obstacles to the harmonisation of national welfare regimes, especially given the myriad differences which continue to separate the Member States when it comes to the basic character, detailed structure and cultural context of their social protection systems.<sup>27</sup> It is true that the Community has steadily increased the range of its ‘new governance’ ventures, aimed at informing and influencing national welfare choices, and encouraging Member States to converge around certain core values and standards: consider, for example, the open method of coordination in the modernisation of social protection, as an integral part of the (post-Lisbon European Council) Social Policy Agenda.<sup>28</sup> Ultimately, however, the lack of extensive harmonising competences makes it difficult to identify a truly effective vehicle by which the Community might articulate any genuinely supranational framework of social solidarity.

That leaves one final option. It remains open for the Union to fall back upon its admittedly less ambitious but still tried-and-tested ‘assimilation model’:

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<sup>26</sup> In particular: Arts 137(2) and (4) EC. Also: Art 18(3) EC.

<sup>27</sup> Eg, M Rhodes, ‘Defending the Social Contract: The EU Between Global Constraints and Domestic Imperatives’ in D Hine and H Kassim (eds), *Beyond the Market: the EU and National Social Policy* (Routledge, 1998).

<sup>28</sup> See, in particular: Commission, *A Concerted Strategy for Modernising Social Protection*, COM(1999) 347 Final; Presidency Conclusions of the Lisbon European Council (23-24 March 2000); Commission, *Social Policy Agenda*, COM(2000) 379 Final.

guaranteeing equal treatment between Community and own nationals, so that foreign migrants are fully integrated into the solidarity system of their host society, but without otherwise questioning the competence of each Member State to determine its own welfare choices (or the persistence of differences between the forms and levels of social protection available across the Union territory) provided they apply without unjustified discrimination on grounds of nationality. The assimilation model is therefore based upon the principle of subsidisation – but the relevant subsidies do not take the form of direct wealth transfers between social groups organised at the Community level. Subsidisation relies instead upon a model of vicarious responsibility: novel expectations of social solidarity engendered at the supranational level are actually discharged (in the sense of paid for) by the Member States through their domestic welfare budgets. For that reason, the assimilation model directly challenges – or at least seeks actively to redefine and reshape – traditional national thresholds of belonging to and exclusion from the solidaristic community. This challenge has been mounted in two main phases.

The first phase – already well consolidated – concerns the interaction between domestic thresholds of belonging / exclusion traditionally based upon nationality; and a supranational assimilation model originally focused upon engagement in an economic activity – especially through the free movement of workers and freedom of establishment. Experience has highlighted an inherent tension between (on the one hand) the mobility needs of the Common Market, including the desire to guarantee equal access to social benefits as a means of ensuring that such mobility is efficacious in practice; and (on the other hand) the collective identity of the solidaristic community which grew from within, or at least alongside, the European nation state, whereby countries were sometimes willing to appropriate the labour of migrant

workers without offering them access to certain welfare benefits in return.<sup>29</sup> This is true less of contributory benefits, or those linked to one's status as a worker, than of non-contributory benefits funded from the public purse that (as we have noted) are usually dependent upon a morally demanding sense of diffuse solidarity – for which purpose, the collective identity has historically been defined by nationality, and the individual's claim to welfare support thus evidenced by her / his status as a national citizen. The Community institutions have consciously set out to deconstruct those thresholds for membership, insofar as they adversely affect economically active migrants by virtue of their nationality. In particular, that is the basis for the guarantee of equal treatment as regards tax and social advantages for foreign workers (whether or not they are resident within the relevant Member State) contained in Article 7(2) Regulation 1612/68.<sup>30</sup> In such situations, a direct contribution to the economic life of the host community enables the foreign worker to overcome the exclusive nature of the group identity, and to benefit from the assimilation model as regards access to (even non-contributory, non-employment related) social benefits.

The second phase – still in its infancy – concerns the interaction between (on the one hand) these new domestic thresholds of belonging, whereby a Member State offers membership of its solidaristic community to all those, regardless of nationality, who make an economic contribution to public resources; and (on the other hand) a

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<sup>29</sup> Consider the national attitudes revealed in disputes such as Case 32/75 *Fiorini v SNCF* [1975] ECR 1085; Case 63/76 *Inzirillo* [1976] ECR 2057; Case 65/81 *Reina* [1982] ECR I-33; Case 261/83 *Castelli* [1984] ECR 3199.

<sup>30</sup> Reg 1612/68 on freedom of movement for workers within the Community, 1968 OJ L257/2. Cp. equivalent principles developed as regards self-employed persons under Art 43 EC, eg Case 305/87 *Commission v Greece* [1989] ECR 1461; Case C-337/97 *Meeusen* [1999] ECR I-3289; Case C-299/01 *Commission v Luxembourg* [2002] ECR I-5899.



supranational assimilation model which has begun to question whether *even that requirement* can act as a legitimate barrier to the social integration of migrant Community nationals. This new interaction has been triggered, in particular, by the introduction of Union citizenship under Article 17 EC, together with rights to free movement for Union citizens under Article 18 EC, and the concomitant entitlement to equal treatment contained in Article 12 EC. These provisions offer a potentially fruitful opportunity to those who advocate the further development of the Community's own autonomous contribution to a multi-level welfare system. The Union may well lack the deep-rooted popular consciousness required to generate a diffuse sense of social solidarity and in turn capable of facilitating the attribution to the Community of extensive redistributive competences. And the Union has not been entrusted with the legal competence required to harmonise the framework within which Member States themselves collect and spend welfare revenue, or organise the provision of basic social benefits and services for their populations. But it is nevertheless possible that Union citizenship will provide a sufficiently cohesive collective identity to justify the assimilation of foreign migrants into the existing domestic welfare systems – so that even those who cannot claim membership of the national solidaristic community on the basis of their nationality or economic contribution would still enjoy the full range of social protection benefits offered by each Member State, and indeed so that the latter willingly accepts its role as an agent in promoting (and funding) a specifically 'European social citizenship'.<sup>31</sup>

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<sup>31</sup> On the broader role of equal treatment as a general principle of Community law, including its transformation from an economic facilitator to an individual social right, eg K Lenaerts, 'L'égalité de traitement en droit communautaire: un principe unique aux apparences multiples' (1991) 26 *Cahiers de Droit Européen* 3; G de Búrca, 'The Role of Equality in European Community Law' in A Dashwood and S O'Leary (eds), *The Principle of Equal Treatment in EC Law* (Sweet & Maxwell, 1997); G More,

However, this mismatch between the Community's potential welfare aspirations, and its actual competence to fulfil them, gives rise to tensions which are surely even more acute than before, going to the very foundations of the solidarity-community-membership triptych. In the first place, there is a sense that Community law might arbitrarily stretch, to beyond its tolerable limit, the moral argument underpinning the acceptance by the national (or local) community of mutual social responsibilities through the process of subsidisation.<sup>32</sup> Indeed, especially when it comes to non-contributory benefits and services funded from general (or local) taxation, it is not clear that the psychological web of fraternal responsibility which justifies and supports public welfare provision will be strong enough to catch not only the foreigner who participates in economic life, but also the foreigner who does not so contribute.<sup>33</sup> In the second place, there is also a feeling that any overly ambitious attempt by the Union to grant unconditional rights to free movement and residency to its own citizens, then simply assimilate them into the domestic systems of social protection, could threaten to undermine the delicate financial stability of national welfare states, by significantly increasing the potential number of people who might

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'The Principle of Equal Treatment: From Market Unifier to Fundamental Right?' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (OUP, 1999).

<sup>32</sup> Cp. J Steiner, 'The Right to Welfare: Equality and Equity Under Community Law' (1985) 10 ELRev 21; C Tomuschat, 'Annotation of *Sala*' (2000) 37 CM LRev 449.

<sup>33</sup> Consider the public debate, across many of the old Member States, over free movement rights for the citizens of the newly acceding Member States, in the few months before enlargement on 1 May 2004: potential contributors as well as potential non-contributors were treated with derision in the popular press as 'spongers' and 'welfare tourists', prompting many governments to introduce or reinforce restrictions on residency and equal treatment rights pursuant to (but sometimes only dubiously in accordance with) the Accession Treaty 2003.

receive solidarity support relative to the actual number of people who contribute to its financing – especially given that the burdens of non-economic migration are not spread evenly across the Member States.<sup>34</sup>

#### IV. RESIDENT ECONOMICALLY INACTIVE MIGRANT UNION CITIZENS

Such tensions are most obvious when one considers the situation of economically inactive migrant Union citizens *residing* in another Member State on a stable and continuous basis. After all, this raises the prospect of individuals, who cannot claim membership of the solidaristic community on the basis of their nationality or economic contribution, nevertheless staking potentially long-term claims to possibly significant levels of welfare support, simply on the basis of their membership of the ‘European community’.<sup>35</sup>

We now have a sufficient mass of caselaw to be able to map out the Court’s general response to this issue. It was established in *Sala* that Community nationals lawfully residing in the territory of another Member State come within the personal

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<sup>34</sup> Consider, for example, the migration patterns associated with cross-border education, whereby certain countries are clearly net importers or net exporters of students, as discussed by S O’Leary, *The Evolving Concept of Community Citizenship: From the Free Movement of Persons to Union Citizenship* (Kluwer Law, 1996) Ch 5; and by C Barnard in this contribution; cf. also A P van der Mei also in this contribution.

<sup>35</sup> Though the Union’s relatively low long-term mobility rates make it possible to argue that rights of equal treatment for lawfully resident migrants will not in practice have a destabilising impact upon national solidarity systems: see, eg A P van der Mei, ‘Residence and the Evolving Notion of European Union Citizenship’ (2003) 5 *European Journal of Migration and Law* 419.

scope of the Treaty provisions on Union citizenship.<sup>36</sup> This is true of Community nationals living within the host territory on the basis of purely domestic immigration rules.<sup>37</sup> But it is also true of Community nationals residing in the Member State on the basis of the Treaty.<sup>38</sup> In this regard, the Court established in *Baumbast* that Article 18 EC creates a directly effective right to residency for all Union citizens.<sup>39</sup> However, the Treaty itself expressly refers to the existence of certain limitations and conditions upon the exercise of that right to residency as laid down under Community law. Those limitations and conditions include the requirement, laid down in secondary Community legislation, that Union citizens must possess sufficient resources and comprehensive medical insurance.<sup>40</sup> Nevertheless, the Community courts will interpret such provisions restrictively, as with all exceptions and limitations imposed upon the fundamental freedoms upheld by the Treaty.<sup>41</sup> Moreover, the Member States, for their part, are obliged to enforce such provisions in accordance with the general principles of Community law and (in particular) the principle of proportionality. This entitles resident economically inactive migrant Union citizens to expect a degree of financial solidarity from their host society, particularly where their welfare needs are

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<sup>36</sup> Case C-85/96 *M M Martínez Sala v Freistaat Bayern* [1998] ECR I-2691.

<sup>37</sup> Case C-85/96 *M M Martínez Sala v Freistaat Bayern* [1998] ECR I-2691.

<sup>38</sup> Case C-184/99 *R Grzelczyk v Centre public d'aide social d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193.

<sup>39</sup> Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091.

<sup>40</sup> In particular: Dir 90/364 on the right of residence, 1990 OJ L180/26; Dir 90/365 on the right of residence for employees and self-employed persons who have ceased their occupational activity, 1990 OJ L180/28; Dir 93/96 on the right of residence for students, 1993 OJ L317/59.

<sup>41</sup> Eg AG Cosmas in Case C-378/97 *Wijsenbeek* [1999] ECR I-6207; AG Tizzano in Case C-200/02 *Chen and Zhu* (Opinion of 18 May 2004; Judgment pending).

temporary and / or limited in character, having regard to their degree of integration into the Member State.<sup>42</sup>

For these purposes, as established in *Sala*, Article 17(2) EC attaches to the status of Union citizen the rights and duties laid down by the Treaty, including the right contained in Article 12 EC not to suffer discrimination on grounds of nationality within the material scope of the Treaty.<sup>43</sup> The Court has demonstrated that it will adopt an extremely broad approach in this regard: *any benefit* which falls within the material scope of *any provision* of Community law will be caught by the combined effects of Articles 17 and 12 EC, and must be offered on an equal basis to lawfully resident migrant Union citizens. There is no need to demonstrate some direct or tangible link between one's enjoyment of the benefit claimed and the exercise of any specific right to residence *qua* Union citizen. For example, in *Sala* itself, a non-contributory child-raising allowance which fell within the scope of Community law both as a family benefit under Article 4(1)(h) Regulation 1408/71, and as a social advantage under Article 7(2) Regulation 1612/68, was automatically treated as falling within the material scope of the Treaty for the purposes of Article 12 EC; discriminatory qualifying criteria could thus be challenged by the claimant, even if she was not an insured person entitled to rely upon Regulation 1408/71, nor a worker

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<sup>42</sup> Further: M Dougan and E Spaventa 'Educating Rudy and the (non-)English Patient: A Double-Bill on Residency Rights under Article 18 EC' (2003) 28 ELRev 699. Also, eg C Jacqueson, 'Union Citizenship and the Court of Justice: Something New Under the Sun? Towards Social Citizenship' (2002) 27 ELRev 260.

<sup>43</sup> Case C-85/96 *M M Martínez Sala v Freistaat Bayern* [1998] ECR I-2691.

entitled to benefit from Regulation 1612/68, simply on the basis that she was a lawfully resident migrant Union citizen.<sup>44</sup>

As regards all benefits falling within the material scope of Article 12 EC, it is possible to challenge both direct discrimination and indirect discrimination on grounds of nationality – including domestic rules which make access to social advantages conditional upon (for example) a certain period of residence, or prior education, within the host territory.<sup>45</sup> However, as the Court held in *Grzelczyk*, the resident economically inactive migrant Union citizen's expectation of financial solidarity from her / his host society cannot in any case justify the claimant becoming an unreasonable burden upon the public finances of the host state.<sup>46</sup> In that event, the national authorities remain competent to terminate the individual's right to residency altogether.<sup>47</sup> By these means, the Union citizen's apparently very broad right to non-discrimination is subject to certain inherent limits: an individual may only claim access to welfare benefits within the basic parameters imposed by the unreasonable

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<sup>44</sup> Similarly, eg with the minimex as a social advantage under Art 7(2) Reg 1612/68 in Case C-184/99 *R Grzelczyk v Centre public d'aide social d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193; and with the tide-over allowance for young people seeking their first employment again as a social advantage under Art 7(2) Reg 1612/68 in Case C-224/98 *M N D'Hoop v Office national d'emploi* [2002] ECR I-6191. Consider also earlier caselaw such as Case 293/83 *Gravier v City of Liège* [1985] ECR 593; though cf. the more restrictive approach in judgments like Case 39/86 *Lair* [1988] ECR 3161.

<sup>45</sup> Consider, eg Case C-299/01 *Commission v Luxembourg* [2002] ECR I-5899 (given period of residence); Case C-224/98 *M N D'Hoop v Office national d'emploi* [2002] ECR I-6191 (prior education).

<sup>46</sup> As referred to in the preamble to each of Dir 90/364, Dir 90/365 and Dir 93/96.

<sup>47</sup> Case C-184/99 *R Grzelczyk v Centre public d'aide social d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193.

financial burden test, beyond which the Member State is entitled to repudiate her / his lawful immigration status, and with it any further entitlement to equal treatment.<sup>48</sup>

The Court's general approach has been adapted to other categories of Union citizen who can be considered lawfully resident within the host state, but whose rights under Article 18 EC are not limited by reference to the requirements of sufficient resources and health insurance, and whose immigration status is therefore not dependent upon staying on the right side of the 'unreasonable burden' principle. For example, Union citizens who arrive in another Member State in search of employment have a right to stay under Article 39 EC for a reasonable period of time, and in any case for so long as they are still actively seeking work and have genuine chances of being engaged.<sup>49</sup> The Court held in *Collins* that such Union citizens, being lawfully present in another Member State, are entitled to claim equal treatment under Article 39 EC, read in conjunction with Article 12 EC, as regards non-contributory benefits such as jobseeker's allowance intended to facilitate access to employment in the host labour market.<sup>50</sup> This time, the workseekers' right to residency – and therefore her / his right to equal treatment – is not conditional upon making only *Grzelczyk*-style reasonable demands upon the public purse. The duration of the Union citizen's expectation of equal treatment as regards access to welfare support is limited only by the claimant ceasing to make genuine efforts to become engaged and thereby losing

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<sup>48</sup> Consider, eg Case C-456/02 *Trojani* (Opinion of 19 February 2004; Judgment pending).

<sup>49</sup> Eg Case C-292/89 ex parte *Antonissen* [1991] ECR I-745; Case C-344/95 *Commission v Belgium* [1997] ECR I-1035.

<sup>50</sup> Case C-138/02 *Collins v Secretary of State for Work and Pensions* (Judgment of 23 March 2004). Here, the British habitual residency requirement was indirectly discriminatory, and had to be objectively justified, by the need for a 'real link' between the claimant and the national employment market: see further below.

any right to stay lawfully within the host state. There is much to be said for this approach, for example, in ensuring that the workseeker's right to free movement has practical rather than just theoretical value, and in encouraging greater labour mobility to help fill skills shortages within the Internal Market.<sup>51</sup> But one must also recognise that the Court has pushed back one step further the threshold of belonging / exclusion by which Member States regulate access to their public welfare systems – a perfect illustration of the assimilation model being used to reshape diverse national conceptions of diffuse solidarity, not *from within* but *from above*, in pursuit of a new Community framework of welfare expectations based upon the common bond of Union citizenship.<sup>52</sup>

## V. THE SITUATION OF TEMPORARY VISITORS

The Court is clearly getting to grips with the friction between conceptions of belonging to / exclusion from the national welfare society, and the prospect of the full

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<sup>51</sup> Even if the eventual outcome of the objective justification process as undertaken in *Collins* is that workseekers enjoy no right to seek social support during their initial residency – which is arguably when some claimants might need it most. Further, eg M Dougan, 'Free Movement: The Workseeker as Citizen' (2001) 4 *Cambridge Yearbook of European Legal Studies* 93.

<sup>52</sup> Note that Dir 2004/38 on the right of citizens and their family members to move and reside freely within the territory of the Member States, 2004 OJ L158/77 will extend the 'limitations and conditions' currently imposed upon exercise of the rights to residence and equal treatment of economically inactive migrants: such Union citizens will have no right to equal treatment as regards social assistance during their first three months' residency; indeed, in the case of workseekers, this derogation from the principle of non-discrimination will apply for so long as they are still seeking employment (in apparent contradiction of the judgment in *Collins*). However, we will suggest (below) that the picture is not so clear as the simple text of Dir 2004/38 would suggest.



rigour of the Community's assimilation model being extended to cover resident but economically inactive migrant Union citizens. Yet the proper legal situation is not nearly so well explored when it comes to *temporary visitors*, that is, economically inactive migrants who do not ordinarily live, and have no desire to establish their usual residence, within the host state.<sup>53</sup> As a matter of policy, we accept that Community law should surely place limits to the integration of temporary visitors into national (or local) solidarity systems – recognising that the ambitions harboured in certain quarters towards creating a supranational model of social citizenship must be reconciled with the limited political and financial ability of the EU (as presently configured) to do so; and therefore that the Treaty must avoid the risk of undermining either the social cohesion or the financial equilibrium of those national (and local) solidarity systems with which it must necessarily interact. The question is how to devise a legal framework capable of accommodating this policy.

In this regard, it is useful to begin by recalling that the equal treatment rights of temporary visitors have traditionally been constrained by the legal capacity in which such Community nationals exercise their entitlement to free movement. Most of the relevant caselaw concerns economic service recipients, and especially cross-border tourists, falling within the personal scope of Article 49 EC.<sup>54</sup> It is clear that, as well as governing the conditions for enjoyment of the economic services whose

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<sup>53</sup> One should acknowledge, but for present purposes need not explore, the factual and definitional problems which can arise in distinguishing lawful residency from a mere lawful presence in the national territory. Consider, in the EC law context, eg Case 76/76 *Di Paolo v Office National de l'Emploi* [1977] ECR 315; Case C-102/91 *Knoch v Bundesanstalt für Arbeit* [1992] ECR I-4341. Similarly, in an English legal context, eg P Smart, 'Ordinarily Resident: Temporary Presence and Prolonged Absence' (1989) 38 ICLQ 175.

<sup>54</sup> Eg, Case 286/82 *Luisi and Carbone* [1984] ECR 377.

receipt justifies the claimant's right to free movement within the host territory in the first place, Community law also makes provision for the enjoyment of certain incidental social advantages funded by the Member State. For these purposes, however, the Court has articulated a relatively limited conception of the range of benefits actually caught by the Treaty – certainly much more limited than the definition adopted as regards Article 7(2) Regulation 1612/68 – and therefore of the potential field of application of the principle of non-discrimination on grounds of nationality.<sup>55</sup> Certainly, the material scope of Article 49 EC is understood to embrace benefits directly linked to enjoyment of the economic services which the claimant has entered the territory to receive: for example, the tariffs for entry into publicly-run museums and galleries at issue in *Commission v Spain* and *Commission v Italy*, which tangibly affect upon the position of cross-border tourists in their capacity as such.<sup>56</sup> Beyond that, the Court has gone no further than finding service recipients entitled to equal treatment as regards access to criminal injuries compensation;<sup>57</sup> and the language in which penal proceedings are conducted.<sup>58</sup>

As regards such social advantages, the temporary visitor is entitled to challenge, on the basis of Article 49 EC, domestic restrictions which directly or

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<sup>55</sup> Note that the Court has hinted at a more generous approach to the range of social advantages potentially covered by Art 49 EC when it comes to service providers, eg access to social housing as addressed in Case 63/86 *Commission v Italy* [1988] ECR 29 (though the Court also noted that, in most cases, service providers will not satisfy the conditions, even of a non-discriminatory nature, bound up with the objectives of national legislation on social housing).

<sup>56</sup> Case C-45/93 *Commission v Spain* [1994] ECR I-911 (state-run museums); Case C-388/01 *Commission v Italy* [2003] ECR I-721 (locally-run museums).

<sup>57</sup> Case 186/87 *Cowan v le Trésor Public* [1989] ECR 195.

<sup>58</sup> Case C-274/96 *Bickel and Franz* [1998] ECR I-1121.

indirectly discriminate on grounds of nationality – including (in particular) residence requirements which inevitably favour own nationals over foreign citizens, especially when the latter travel as temporary visitors.<sup>59</sup> However, few commentators seem to believe that Article 49 EC confers any right upon migrant service recipients to claim equal treatment as regards welfare benefits *per se* within the host territory. In the first place, surely such benefits are not among the range of incidental social advantages falling within the material scope of Article 49 EC: their enjoyment can hardly be seen as directly linked to the effective exercise of free movement rights by economic service recipients such as tourists.<sup>60</sup> In the second place, the availability of publicly funded services cannot constitute provision of the primary economic service whose receipt is constitutive of the claimant's entire right to free movement within the relevant Member State. It is true that the Court in judgments such as *Peerbooms* and *Müller-Fauré* has adopted a relatively fluid interpretation of the relationship between the provision of publicly funded benefits in one's *home state*, and obstacles to the receipt of private economic services within another country, for the purposes of liberalising the cross-border availability of healthcare.<sup>61</sup> However, this caselaw does

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<sup>59</sup> As in Case C-274/96 *Bickel and Franz* [1998] ECR I-1121.

<sup>60</sup> In particular: P Craig and G de Búrca, *EU Law: Text, Cases and Materials* (OUP, 3<sup>rd</sup> ed, 2003) pp 812-814. Cp. F Weiss and F Wooldridge, *Free Movement of Persons Within the European Community* (Kluwer Law International, 2002) p 124. For an indication that there are indeed limits to the Court's functional approach to equal treatment as regards social advantages, for the purposes of enhancing the exercise of economic rights to free movement, consider Case C-291/96 *Grado and Bashir* [1997] ECR I-5531.

<sup>61</sup> Case C-157/99 *B S M Garaets-Smits v Stichting Ziekenfonds VGZ and Peerbooms v Stichting CZ Groep Zorgverzekeringen* [2001] ECR I-5473; Case C-385/99 *Müller Fauré v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA*, and *van Riet v Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen* [2003] ECR I-4509; for a critique of the Court's reasoning cf. E Spaventa

not call into question the established principle that social advantages subsidised entirely from the public purse by the *host state* cannot in themselves constitute the provision of an economic service for the purposes of Community law.<sup>62</sup> For these two reasons, it is thought safe to assume that host states are entitled (in effect) to discriminate directly or indirectly on the basis of nationality as regards access to welfare benefits, particularly through the imposition of residency requirements, without exposing themselves to the possibility of legal challenge by adversely affected temporary visitors relying upon Article 49 EC.<sup>63</sup>

But the situation of temporary visitors must be reassessed according to the new legal capacity in which such Community nationals now exercise their right to free movement. In particular, how does Union citizenship affect the right to equal treatment enjoyed by temporary visitors within their host society? It is possible to identify two main approaches: the first accepts that temporary visitors should enjoy extensive rights to equal treatment within the host society, so that discriminatory restrictions on their access to welfare benefits must always be objectively justified in accordance with a valid public interest requirement and the principle of proportionality; whereas the second argues in favour of a closer analysis of whether temporary visitors should actually be considered in a comparable situation to own

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'Public Services and European Law: Looking for Boundaries' (2002-2003) 5 *Cambridge Yearbook of European Legal Studies* 271.

<sup>62</sup> In particular: Case 263/86 *Humbel* [1988] ECR 5365; Case C-109/92 *Wirth* [1993] ECR I-6447.

<sup>63</sup> Though several authors pointed out that the scope of equal treatment as regards social advantages under Art 49 EC was, to be fair, unstable and open to more expansive future interpretation (especially given the tenuous link between the receipt of tourist services and access to criminal injuries compensation in *Cowan*), eg S Weatherill and P Beaumont, *EU Law* (Penguin Books, 1999) pp 704-706.

nationals and other lawful residents, before Member States are placed under any obligation to justify apparently discriminatory restrictions on access to their social solidarity benefits. We will now assess each of these approaches in turn.

## VI. TEMPORARY VISITORS: THE OBJECTIVE JUSTIFICATION APPROACH

### A. Equal Treatment for Temporary Visitors

On the basis of the Court's caselaw since 1998, there is significant support for the view that temporary visitors have become entitled to move across the Member States *qua* Union citizens, exercising directly effective rights under Article 18 EC; and as such, are able to rely upon the principle of non-discrimination contained in Article 12 EC as regards all matters falling within the material scope of Community law.<sup>64</sup> The argument runs as follows.

If Community nationals *lawfully residing* in the territory of another Member State (including those lawfully resident by virtue of the Treaty) come within the personal scope of the provisions on Union citizenship under Article 17 EC, so too should Community nationals *lawfully visiting* the territory of another Member State. After all, they too count among the beneficiaries of Article 18 EC, which refers to a right not only to reside, but also simply to move across the entire Community

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<sup>64</sup> For endorsement (and further detailed analysis) of this objective justification approach to equal treatment as regards welfare benefits and services for temporary visitors *qua* Union citizens, consider A P van der Mei, *Free Movement of Persons within the European Community: Cross-Border Access to Public Benefits* (Hart Publishing, 2003) Ch 6, esp pp 461-480.

territory. That proposition is supported by the judgment in *Bickel and Franz*: besides observing that Article 49 EC covers all Community nationals who visit another Member State where they intend or are likely to receive services, and are thus free to visit and move around within the host territory, the Court also noted that Article 18 EC confers upon every Union citizen the right to move freely across the Community.<sup>65</sup> That point was reinforced by judgments such as *Grzelczyk* and *D'Hoop*: referring back to *Bickel and Franz*, the Court held that the situations falling within the personal scope of Community law include exercise of the fundamental freedoms guaranteed by the Treaty and, in particular, the freedom to move within the territory of the Member States under Article 18 EC.<sup>66</sup>

It is true that the Court often adopts a default approach to the application of Article 18 EC, refusing to address the legal impact of Union citizenship insofar as disputes can adequately be resolved through reliance upon traditional free movement provisions such as Articles 39, 43 and 49 EC.<sup>67</sup> However, this is unlikely to mean that temporary visitors, since they remain entitled to free movement under the specific provisions of Article 49 EC, will in practice be unable to rely upon the Union

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<sup>65</sup> Case C-274/96 *Bickel and Franz* [1998] ECR I-1121, para 15.

<sup>66</sup> Case C-184/99 *R Grzelczyk v Centre public d'aide social d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193, para 33; Case C-224/98 *M N D'Hoop v Office national d'emploi* [2002] ECR I-6191, para 29. Also, eg Case C-148/02 *Garcia Avello* [2003] ECR I-0000, para 24; Case C-224/02 *Pusa* (Judgment of 29 April 2004), para 17.

<sup>67</sup> Eg, Case C-100/01 *Ministre de l'Intérieur v A O Olazabal* [2002] ECR I-10981 on Art 39 EC; Case C-193/94 *Skanavi* [1996] ECR I-929 on Art 43 EC; Case C-92/01 *Stylianakis* [2003] ECR I-1291 on Art 49 EC.

citizenship provisions.<sup>68</sup> In particular, the Court seems happy to consider the legal effects of Article 18 EC in situations where this provision is capable of enhancing appreciably the scope or quality of the rights enjoyed by Union citizens, as compared to those derived from other legal bases upon which the claimant might theoretically also rely. For example, the Court held in *Grzelczyk* that there is nothing in the Treaty text to suggest that students who are Union citizens, when they move to another Member State to study there, lose the rights which the Treaty confers upon Union citizens – including the right to equal treatment as regards welfare benefits falling within the material scope of Community law.<sup>69</sup> This was true, regardless of the fact that such students could have been said already to enjoy a legal basis for their right to residency under Article 12 EC and Directive 93/96.<sup>70</sup> Similarly, the Court held in *Collins* that the workseeker's inability to challenge discrimination as regards financial benefits under Article 39 EC and Regulation 1612/68, as established in judgments such as *Lebon*,<sup>71</sup> had to be updated in the light of the introduction of Union citizenship and developments in the scope of the principle of equal treatment under Article 12 EC – permitting migrant workseekers to claim access to financial benefits such as

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<sup>68</sup> Not least because judicial practice has never been entirely consistent on this matter: the Court does sometimes mention Art 18 EC as an independent source of legal rights, even when traditional free movement provisions alone could have resolved the relevant dispute, eg Case C-274/96 *Bickel and Franz* [1998] ECR I-7637; Case C-135/99 *Elsen* [2000] ECR I-10409.

<sup>69</sup> Case C-184/99 *R Grzelczyk v Centre public d'aide social d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193.

<sup>70</sup> Case C-357/89 *Raulin* [1992] ECR I-1027 on Art 12 EC; Dir 93/96 on the right of residence for students, 1993 OJ L317/59.

<sup>71</sup> Case 316/85 *Lebon* [1987] ECR 2811.

jobseeker's allowance.<sup>72</sup> This was true, regardless of the fact that such workseekers could have been said to enjoy a legal basis for their right to residency under Article 39 EC, as construed in judgments such as *ex parte Antonissen*.<sup>73</sup> By analogy, temporary visitors should also be entitled to rely on the Treaty to enjoy the rights which Community law confers upon Union citizens – regardless of (and in addition to) any other rights they might enjoy under provisions such as Article 49 EC.

With the fact that temporary visitors now fall within the personal scope of Article 17 EC, continues the argument, should come all the rights and duties laid down by the Treaty which, according to the judgment in *Sala*, are inseparably linked to the status of Union citizen – including the right to equal treatment under Article 12 EC across the material field of application of Community law.<sup>74</sup> For these purposes, why should the Court follow anything other than the same broad conception of 'material scope' it adopts as regards lawfully resident migrants? In particular, why should there be the need to demonstrate any particular link between one's right to enjoyment of the benefit claimed and the effective exercise of one's right to free movement *qua* Union citizen? It is therefore possible that temporary visitors are now entitled to equal treatment, under Article 12 EC, as regards access to whatever welfare benefits fall within the material scope of any provision of Community law – including the vast range of social advantages generally covered by Article 7(2) Regulation 1612/68.<sup>75</sup>

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<sup>72</sup> Case C-138/02 *Collins v Secretary of State for Work and Pensions* (Judgment of 23 March 2004).

<sup>73</sup> Case C-292/89 *ex parte Antonissen* [1991] ECR I-745.

<sup>74</sup> Cp. Case C-274/96 *Bickel and Franz* [1998] ECR I-7637, para 16.

<sup>75</sup> Cp. S Fries and J Shaw, 'Citizenship of the Union: First Steps in the European Court of Justice' (1998) 4 *European Public Law* 533, who observe that 'after the ECJ's judgment in *Martínez Sala*, it would appear that something close to a universal non-discrimination right including access to all



This line of argument can be clearly discerned in the Commission's 2003 revised proposal for a directive on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States.<sup>76</sup> This proposal recognised two categories of temporary visitor: first, draft Article 6 offered a blanket right of up to six months' residency for all Union citizens, without the host state being able to impose any conditions whatsoever; and secondly, draft Article 7 envisaged a right of residency for more than six months for those Union citizens who are service recipients in the sense of Article 49 EC. For both these categories of temporary visitor, draft Article 21 guaranteed equal treatment by the host state with its own nationals 'in areas covered by the Treaty'. The Commission had originally proposed that Union citizens exercising their free movement rights, but who were not engaged in some gainful activity in either an employed or a self-employed capacity, and had not yet acquired the right of permanent residency in accordance with the draft directive, should not be entitled to equal treatment as regards entitlement to social assistance.<sup>77</sup> However, that limitation was erased from the revised proposal on the grounds that, in the light of the judgment in *Grzelczyk*, it would be retrogressive in relation to the evolving *acquis communautaire* to exclude those economically inactive Union citizens without a right of permanent residence from access to welfare assistance.<sup>78</sup> But for these purposes, the draft directive drew no distinction between economically inactive Union citizens ordinarily resident within the host state (for example) as students or retired persons; and those who are better seen merely as

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manner of welfare benefits has now taken root in Community law as a consequence of the creation of the figure of the Union citizen' (at p 536).

<sup>76</sup> COM(2003) 199 Final.

<sup>77</sup> COM(2001) 257 Final, draft Art 21(2).

<sup>78</sup> COM(2003) 199 Final, pp 7-8.

temporary visitors either relying upon the blanket right to six months' residency, or qualifying to stay for longer as service recipients. In the Commission's view, *every* migrant Union citizen should be entitled to equal treatment within the host territory across the material scope of Community law, *even* as regards welfare benefits.<sup>79</sup>

Following that line of analysis, it would seem difficult to identify many limits to the scope of the right to equal treatment enjoyed by temporary visitors. In particular, such Union citizens would be offered the opportunity to challenge restrictions which they could not otherwise have queried in another legal capacity under the traditional free movement provisions: social advantages not available to the temporary visitor *qua* service recipient under Article 49 EC could now be opened up to claimants *qua* Union citizen under Articles 18 and 12 EC. The onus would therefore fall on Member States to attempt to justify any restriction which directly or indirectly discriminates on grounds of nationality – including residency requirements of the sort which commonly regulate access to solidarity benefits at the national or local level.<sup>80</sup>

## **B. Objective Justifications for Discrimination**

In particular, indirect discrimination must be justified in accordance with an imperative requirement and the principle of proportionality. For these purposes, the Court in *D'Hoop* recognised that it was legitimate, in the case of a special

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<sup>79</sup> The only exception was to have been maintenance grants for migrant students (until they acquired the right of permanent residency): COM(2003) 199 Final, draft Art 21(2).

<sup>80</sup> For examples of residency requirements as indirect discrimination in free movement disputes; consider Case C-111/91 *Commission v Luxembourg* [1993] ECR I-817; Case C-299/01 *Commission v Luxembourg* [2002] ECR I-5899.

unemployment benefit for young people seeking their first job, for Member States to insist on the existence of a ‘real link’ between the claimant and the geographic employment market.<sup>81</sup> Such a real link could (in principle) be made dependent upon the claimant having completed her / his education within the national territory – even though such a requirement is clearly indirectly discriminatory against migrant Union citizens.<sup>82</sup> The same approach was adopted in *Collins*. Here, the Court accepted that a habitual residency requirement is (in principle) appropriate for the purpose of ensuring that some connection exists between those who claim a non-contributory jobseeker’s allowance and the competent state’s employment market.<sup>83</sup> Although both judgments concerned benefits directly related to the individual’s future participation in the economic life of the host society, it seems likely that a similar approach will extend to other types of welfare benefits intended to cover more universal social risks, such as disability allowances or healthcare provision.<sup>84</sup> By these means, Member

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<sup>81</sup> Case C-224/98 *M N D’Hoop v Office national d’emploi* [2002] ECR I-6191.

<sup>82</sup> However, the principle of proportionality required that the Member State took into account the claimant’s most recent (university) education, rather than recognising only secondary education.

<sup>83</sup> Case C-138/02 *Collins v Secretary of State for Work and Pensions* (Judgment of 23 March 2004).

<sup>84</sup> Consider other judgments in which the Court acknowledges the legitimacy (in principle) of some sort of link between the claimant, the disputed benefit and the social environment of the competent state, eg Case 313/86 *Lenoir* [1988] ECR 5391. In particular, consider the caselaw on hybrid benefits under Reg 1408/71 (where the claimant had to demonstrate a link to the national social security system, even if that link need not have been based on residency), eg Case 1/72 *Frilli* [1972] ECR 457; Case C-356/89 *Newton* [1991] ECR I-3017. Similarly, consider the caselaw on special non-contributory benefits under Reg 1408/71 (where the Court analysed the legislative amendments indeed making residency the required link to the national social security system), eg Case C-20/96 *Snares* [1997] ECR I-6057; Case C-297/96 *Partridge* [1998] ECR I-3467. Consider finally the caselaw on ex-workers who are no longer resident in the competent state, but still seek access to social advantages, the latter not being linked to

States will have a principled doctrinal defence for their insistence that claimants demonstrate some genuine nexus with the national territory before being able to access a whole range of social provisions. More fundamentally, the Court's idea of a 'real link' between claimant and host society can be understood as referring to our first, *moral*, argument – respecting the diffuse psychological sense of fraternity and concomitant assumption of mutual welfare responsibilities – that underpins the solidarity-community-membership triptych.

Furthermore, although it is settled Community law that purely economic goals can never constitute a valid imperative requirement,<sup>85</sup> Member States may legitimately take account of certain financial considerations when attempting to justify indirectly discriminatory barriers to free movement on broader public interest grounds. In particular, the Court in judgments like *Kohll* and *Peerbooms* was prepared to accept that the possible risk of seriously undermining the financial balance of the social security system may constitute an overriding reason in the general interest capable of justifying a barrier to the exercise of fundamental Treaty freedoms; and also recognised that maintaining an adequate standard of welfare provision for the benefit of the entire population (*in casu*, in the field of public health, though the same approach could, in principle, apply to other forms of social protection) is inextricably linked to the Member State's ability to exercise effective control over its levels of financial expenditure.<sup>86</sup> This in turn implies that the competent public authorities must

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their previous contract of employment, eg Case C-43/99 *Leclere* [2001] ECR I-4265; Case C-33/99 *Fahmi* [2001] ECR I-2415.

<sup>85</sup> Eg, Case C-398/95 *SETTG* [1997] ECR I-3091.

<sup>86</sup> Case C-158/96 *Kohll v Union des Caisses de Maladie* [1998] ECR I-1931; Case C-157/99 *B S M Garaets-Smits v Stichting Ziekenfonds VGZ and Peerbooms v Stichting CZ Groep Zorgverzekeringen* [2001] ECR I-5473.

be in a position to curtail the range of individuals (and especially foreign migrants) capable of staking claims against its social solidarity system.<sup>87</sup> The need to preserve the budgetary balance of the welfare state not only provides the Member States with another principled legal defence to indirectly discriminatory qualifying criteria, but again corresponds, more fundamentally, to our second, *financial*, argument – maintaining a realistic equilibrium between welfare supply and demand – that welds together the concepts of solidarity, community and membership.

### **C. Problems With the Objective Justification Approach**

And so, even employing an objective justification approach, it seems unlikely that the Court would in practice allow temporary visitors to free ride on the welfare systems of other Member States. Nevertheless, one should still query whether this objective justification approach is entirely satisfactory. We would argue that there are considerable practical and conceptual problems in requiring automatic judicial scrutiny over rules which make non-contributory social benefits conditional upon requirements such as residency within the national territory.

First, the imperative requirements doctrine requires the national courts to undertake an assessment of the proportionality of the disputed domestic rules. This assessment might be workable enough when the Treaty permits us clearly to identify the conflicting interests which must be balanced one against the other: for example, eliminating protectionist and discriminatory trade practices, versus respecting national regulatory traditions. But history tells us that, even within the framework of economic

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<sup>87</sup> Consider also the Court's approach to protecting the stability of national social protection systems in judgments such as Case C-356/89 *Newton* [1991] ECR I-3017.

integration, this proportionality assessment is difficult and inevitably more subjective when the yardstick against which the exercise of national regulatory competence must be evaluated becomes more blurred: recall the problems encountered by the English courts when assessing the proportionality of the Sunday trading rules, expected to balance the relative merits of protecting cultural traditions and the freedom to exercise an economic activity.<sup>88</sup> How much more difficult will the proportionality assessment become when the scales are weighed between promoting some form of *non-economic* European integration and protecting the national welfare systems? Indeed, in the field of equal treatment for Union citizens – particularly when it comes to an imperative requirement as abstract as the ‘real link’, which demands an exploration of its own moral relevance to the cultural fabric of the welfare society as the finale to any proportionality assessment – the national courts will be expected to navigate their way through a framework of values which is much less tangible than anything we have encountered under Articles 28, 39, 43 or 49 EC. More likely, the notion of the ‘real link’ will end up serving its time as an intellectually impoverished substitute for the sort of rigorous analysis of the meaning of social solidarity within Europe’s multi-level welfare society now called for by combined effect of Articles 18 and 12 EC. Worse still, the principle that Member States may insist upon a ‘real link’ between certain benefits and certain claimants might simply become a smokescreen for highly subjective judgments, made by the courts, about which Union citizens do or do not deserve public support.<sup>89</sup>

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<sup>88</sup> Further, eg A Arnall, ‘What Shall We Do On Sunday?’ (1991) 16 ELRev 112.

<sup>89</sup> For criticisms of the vague and malleable nature of the ‘real link’ concept: S O’Leary, ‘Solidarity and Citizenship Rights in the Charter of Fundamental Rights of the European Union’ in *Collected Courses of the Academy of European Law* 2003 (forthcoming).

Secondly, the proportionality assessment – particularly when applied to the imperative requirement of preserving the financial integrity of the welfare system – might well pose important practical problems. If disputes over access to social benefits by temporary visitors were to be assessed having sole regard to the particular claim before the court, then a residency requirement would *never* be justified – since a single individual would not be capable of endangering the balance of a national welfare system. To avoid this result, analysis should focus on the potential cumulative effect of multiple claims – as the Court itself recognised in *Müller-Fauré* in respect of the cross-border provision of healthcare services.<sup>90</sup> Yet it is hardly thinkable that national courts would have the resources to engage in a detailed statistical and budgetary analysis of the consequences of such possible demands for welfare benefits by temporary visitors. It is much more likely that the proportionality of residency requirements would be carried out having regard to purely speculative factors. Again, the approach in *Müller-Fauré* is enlightening: the Court felt able to state, on the basis of an intuitive assessment, without the apparent support of any empirical research – and within the context of non-contentious proceedings under an Article 234 EC reference – that the removal of any prior authorisation requirement for non-hospital treatment abroad would not jeopardise the financial balance of the national healthcare system.<sup>91</sup>

Both these problems are made worse by the risk of inconsistency in the uniform application of Community law by the national courts. Given the difficulties

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<sup>90</sup> Case C-385/99 *Müller Fauré v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA*, and *van Riet v Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen* [2003] ECR I-4509, para 74.

<sup>91</sup> Further: E Spaventa ‘Public Services and European Law: Looking for Boundaries’ (2002-2003) 5 *Cambridge Yearbook of European Legal Studies* 271.

involved in assessing the proportionality of residency requirements as regards welfare benefits, the end result reached by domestic judges is very likely to vary – especially across different Member States – according to the manner in which the welfare system is organised, and the way in which social provision itself is culturally perceived.

One final difficulty concerns not so much the proportionality assessment as the underlying conceptual framework of the objective justification approach. This framework necessarily implies that, in principle, and subject only to justified exceptions, national welfare provisions *should* be available to *all* Union citizens in *all* Member States, regardless of nationality or contribution, and merely by virtue of Articles 18 and 12 EC. If this is true, it is no longer the case that Community law is gradually reshaping national thresholds of belonging to or being excluded from the welfare society. Something altogether more dramatic is occurring: Union citizenship is being *elevated above*, and *superimposed upon*, the notion of national solidarity. Indeed, the very fact that a Member State must always justify restrictions on access to social benefits by visitors suggests that the Union citizen *as such* has been catapulted in the host welfare society. This bold extension of the assimilation model may well bring Union citizenship a big step closer to fulfilling its destiny as the ‘fundamental status of the nationals of the Member States’.<sup>92</sup> But it is far from evident that such a development tallies with current reality within Europe’s multi-level welfare system,

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<sup>92</sup> Eg, Case C-184/99 *R Grzelczyk v Centre public d’aide social d’Ottignies-Louvain-la-Neuve* [2001] ECR I-6193, para 31; Case C-224/98 *M N D’Hoop v Office national d’emploi* [2002] ECR I-6191, para 28; Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091, para 82.



where the Member States still legitimately claim primary sovereignty over welfare provision.

Yet if the objective justification approach does not emerge as an entirely satisfactory conceptual tool to deal with the problem of equal treatment for temporary visitors, where is the solution to be found? In our opinion, a more careful assessment of whether discrimination exists *at all* might provide us with a more rigorous framework for analysis.

## VII. TEMPORARY VISITORS: THE COMPARABILITY APPROACH

### A. Assessing the Very Existence of Discrimination

Discrimination arises when two comparable situations are treated differently, or two non-comparable situations are treated similarly.<sup>93</sup> If the situations are not comparable, any disparity in treatment does not give rise to discrimination (and does not need to be justified).<sup>94</sup>

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<sup>93</sup> Eg, Case C-137/00 *The Queen v The Competition Commission, Secretary of State for Trade and Industry and The Director General of Fair Trading, ex parte Milk Marque Ltd and National Farmers' Union* [2003] ECR I-0000 para 126.

<sup>94</sup> The assessment of whether two products are comparable is essential in order to establish the existence of discriminatory taxation in relation to Art 90 EC (where the Court has held that the lack of any comparator altogether excludes the existence of discrimination), eg Case C-47/88 *Commission v Denmark* [1990] ECR I-4509; Case C-383/01 *De Danske Bilimportører v Skatteministeriet, Told-og Skattestyrelsen* [2003] ECR I-6065. The notion of comparability was used to exclude discrimination, *inter alia*, in the following cases: Case C-14/01 *Molkerei Wagenfeld Karl Niemann GmbH & Co. KG v Bezirksregierung Hannover* [2003] ECR I-2279; Case C-137/00 *R v The Competition Commission, ex parte Milk Marque Ltd* (Judgment of 9 September 2003). See also the tax caselaw under Art 43 EC, eg

In economic free movement cases, comparability is usually taken for granted: the situation of the national worker or self-employed person and the foreign worker or self-employed person is deemed to be comparable, and therefore not specifically assessed by the Court. Nonetheless, even as regards economic migrants, there are disputes in which the Court has had recourse to a prior analysis of comparability in order to exclude the existence of discrimination, and thereby avoid any assessment of whether the disputed national rules pursued a legitimate aim in a proportionate manner. For example, the claimant in *Kaba* argued that British rules prescribing different time-scales for a spouse to gain indefinite leave to remain, depending upon whether the main right-holder was a person ‘present and settled’ in the United Kingdom or a Community worker, were discriminatory. However, the Court found that the situation of a Community worker is *not comparable* to that of a person present and settled in the United Kingdom, since the former’s right to residence within the national territory is not unconditional. Consequently, Member States are entitled to take into account this *objective difference* when laying down their immigration rules – without having to undergo judicial scrutiny in accordance with the objective justification model.<sup>95</sup> Conversely, *Ferlini* concerned the application of

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Case C-279/93 *Finanzamt Köln-Altstadt v Roland Schumacker* [1995] ECR I-225; Case C-391/97 *Frans Gschwind v Finanzamt Aachen-Außenstadt* [1999] ECR I-5451; Case C-234/01 *A Gerritse v Finanzamt Neukölln-Nord* [2003] ECR I-5933. The question of whether two categories of persons are in a comparable situation (and must for that reason enjoy some sort of social advantage under the same conditions) is a question involving the interpretation of Community law over which the Court of Justice has the final say, eg, Case C-466/00 *A Kaba v Secretary of State for the Home Department* (Kaba II) [2003] ECR I-2219, para 44.

<sup>95</sup> Case C-356/98 *A Kaba v Secretary of State for the Home Department* (Kaba I) [2000] ECR I-2623; upheld in Case C-466/00 *A Kaba v Secretary of State for the Home Department* (Kaba II) [2003] ECR

Article 12 EC to the fees demanded by a group of private hospitals from a Community official who was not insured under the national social security system (such fees being higher than those charged to insured persons). In order to assess whether Article 12 EC applied at all, the Court first assessed the comparability of the claimant's situation with that of an insured person. Only after being satisfied that such comparability existed did the Court proceed to analyse the hospitals' purported justification for the discriminatory difference in treatment.<sup>96</sup>

In the citizenship free movement cases too, there are judgments where the issue of comparability between own nationals and migrant Community nationals has played a more explicit role in the Court's reasoning. For example, the Court in *Sala* observed that, since the claimant had been authorised to reside in Germany in accordance with domestic immigration legislation, she was to be considered in the same position as a German national residing in the national territory. On that basis, the claimant was entitled to rely on Article 12 EC as regards a non-contributory child-raising benefit, in principle reserved to those permanently or ordinarily resident in the Member State, so as to challenge certain directly discriminatory qualifying criteria.<sup>97</sup> Similarly, the Court in *Grzelczyk* began its substantive analysis of the case by observing that a student of Belgian nationality who found him/herself in exactly the same circumstances as the claimant would have satisfied the conditions for obtaining the disputed minimum subsistence benefit. The fact that the claimant was

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I-2219. However, the Court's reasoning in *Kaba I* has been strongly criticised: see S Peers, 'Dazed and Confused: Family Members' Residence Rights and the Court of Justice' (2001) 26 ELRev 76.

<sup>96</sup> Case C-411/98 *A Ferlini v Centre Hospitalier de Luxembourg* [2000] ECR I-8081. Consider also, eg Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte* [2001] ECR I-7831.

<sup>97</sup> Case C-85/96 *M M Martínez Sala v Freistaat Bayern* [1998] ECR I-2691.

not of Belgian nationality constituted the only bar to his application for welfare support, and it was therefore clear to the Court that the case was one of discrimination based solely on the ground of nationality.<sup>98</sup> Conversely, the Court in *Garcia Avello* had recourse to the notion of comparability, this time to establish that identical treatment by the Member State of two situations which could not in fact be considered comparable amounted to discrimination which then needed to be justified.<sup>99</sup> And more generally, the Court throughout its citizenship caselaw seems (consciously) to have left open the door to a more extensive future role for the comparability question: ‘Union citizenship is destined to be the fundamental status of nationals of the Member States, *enabling those who find themselves in the same situation* to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for’.<sup>100</sup> Clearly, comparability is often assumed – but it is not ignored altogether.

## **B. Comparability and Temporary Visitors**

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<sup>98</sup> Case C-184/99 *R Grzelczyk v Centre public d’aide social d’Ottignies-Louvain-la-Neuve* [2001] ECR I-6193.

<sup>99</sup> Case C-148/02 *Garcia Avello* [2003] ECR I-0000. Consider also, eg AG Ruiz-Jarabo Colomer in Case C-386/02 *Baldinger* (Opinion of 11 December 2003; Judgment pending); AG Geelhoed in Case C-456/02 *Trojani* (Opinion of 19 February 2004; Judgment pending).

<sup>100</sup> Case C-184/99 *Grzelczyk* [2001] ECR I-6193, para 31 (emphasis added). Also, eg Case C-224/98 *M N D’Hoop v Office national d’emploi* [2002] ECR I-6191, para 28; Case C-138/02 *Collins v Secretary of State for Work and Pensions* (Judgment of 23 March 2004), para 61; Case C-224/02 *Pusa* (Judgment of 29 April 2004), para 16.

This framework – based upon a prior assessment of comparability, though incorporating a set of refutable presumptions – could be usefully adopted in relation to claims over social advantages by migrant Union citizens.

To begin with, Union citizens who are lawfully resident in another Member State should, as a matter of principle, be considered in a comparable situation to own nationals, and therefore entitled to equal treatment (subject to justifications) in respect of all benefits.<sup>101</sup> Moreover, other Union citizens who are not resident but nevertheless have a ‘real link’ to the host territory may also be treated as being in a comparable situation to own nationals and lawful residents. This is the case particularly for frontier workers, who enjoy equal treatment as regards all social advantages falling within Article 7(2) Regulation 1612/68, and are therefore entitled to challenge discriminatory requirements imposed by the host state – demonstrating that membership of the solidaristic community may be established by means other than residency.<sup>102</sup> It might even be the case that, in relation to certain other non-residents, the introduction of Union citizenship shifts the focus away from a purely market-oriented notion of belonging, whereby entitlement to benefits is a direct result of the economic output produced by the frontier worker, towards a broader notion of inclusion, whereby entitlement to benefits is recognised also for those whose claim to membership of the solidaristic community can be established through non-economic links: for instance, by performing unpaid activity in the context of charitable work.

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<sup>101</sup> Except for those which are still linked to the notion of nationality: consider, eg Case 207/78 *Even* [1979] ECR 2019; Case C-315/94 *Peter de Vos* [1996] ECR I-1417; Case C-356/98 *A Kaba v Secretary of State for the Home Department* (Kaba I) [2000] ECR I-2623; upheld in Case C-466/00 *A Kaba v Secretary of State for the Home Department* (Kaba II) [2003] ECR I-2219.

<sup>102</sup> Eg, Case C-57/96 *Meints* [1997] ECR I-6689; Case C-337/97 *Meeusen* [1999] ECR I-3289.

However, as regards other non-residents – temporary visitors *stricto sensu* – the situation is more complex, and comparability needs to be established before a finding of discrimination can be made. For these purposes, an assessment of whether the two situations are comparable will necessarily depend upon the type of benefit claimed. Broadly speaking, we can distinguish benefits paid by the public purse into three categories: those which arise from the discharge of *public order duties* pertaining to the state's sovereignty; those which arise out of the state's choice to use public funding to foster *non-solidaristic* policy objectives; and those which indeed reflect a *link of solidarity* between community and individual.

Benefits arising from the discharge of public order duties would include, for instance, defence, police, and the administration of justice, that is, areas which are usually considered the key element of sovereignty and where the state claims an absolute monopoly. Here, the state owes similar duties towards all those who are subject to its jurisdiction and / or present within its territory, and therefore comparability between residents and non-residents should be easily established.<sup>103</sup> Take the social advantage at issue in *Cowan*: the French compensation scheme for victims of crime resulted from the state's acknowledgment of failures in its policing duties – borne towards residents and non-residents alike – so that such a benefit could not be made conditional upon residency, even though it is entirely funded from the public purse.<sup>104</sup> Or consider the social advantage at issue in *Bickel and Franz*: the language used in criminal proceedings directly related to the rules of procedure in the

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<sup>103</sup> Cp. the idea of the state's 'night-watch' duties as developed in A P van der Mei, *Free Movement of Persons within the European Community: Cross-Border Access to Public Benefits* (Hart Publishing, 2003) Ch 1.

<sup>104</sup> Case 186/87 *Cowan v le Trésor Public* [1989] ECR 195.

administration of justice – a public law duty borne by the Italian state towards residents and non-residents alike – which could not be made dependent upon residency within the local territory.<sup>105</sup> This is not to say that such indirect discrimination can never be justified, only to observe that it must be justified, by reference to an imperative requirement plus the principle of proportionality.

The second category of benefits are those which, again funded from the public purse, *neither* represent a discharge by the state of its fundamental public order duties *nor* reflect a link of solidarity between the community and the individual. The state may be seeking to fulfil certain social policy objectives (such as the preservation and dissemination of the collective heritage), but it is not assuming responsibility for the basic physical and economic well-being of the members of *its* community. In such cases, comparability should also readily be established. Take, for example, *Commission v Spain* and *Commission v Italy*, where the Court extended the principle of non-discrimination to cover the conditions for entry into museums, accepting (as we have seen) that there was a close link to the reception of economic services as a tourist, thus triggering the joint application of Articles 49 and 12 EC.<sup>106</sup> Following the direct effect of Article 18 EC, a different and more consistent framework of analysis should be adopted. The tourist *qua* Union citizen clearly falls within the personal scope of the Treaty, and museum entry conditions clearly fall within the material scope of the Treaty. Thus, so long as the situations are comparable, the principle of equal treatment applies and any residency requirement needs to be justified. Given that entry into museums is clearly not a manifestation of solidarity premised upon

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<sup>105</sup> Case C-274/96 *Bickel and Franz* [1998] ECR I-1121.

<sup>106</sup> Case C-43/93 *Commission v Spain* [1994] ECR I-911; Case C-388/01 *Commission v Italy* [2003] ECR I-721.

membership of the national community, but an aspect of broader cultural and educational policy objectives, there is no reason why a non-resident tourist should be considered in any way different from a resident tourist.<sup>107</sup>

Finally, there are those benefits which indeed stem from a link of social solidarity: for example, subsistence benefits like income support, disability allowances, and non-emergency healthcare. Such benefits truly reflect the assumption of responsibility by the community towards *its* weaker members, and the situation of the resident should in principle be considered non-comparable to that of the non-resident, who does not *belong* to the host society. In such cases, therefore, Member States should in principle be allowed to ‘distinguish’ on grounds of residency without having to rely on the imperative requirements doctrine, or undergoing the proportionality assessment. Imagine that a French tourist presents herself at a London hospital asking for treatment – free at the point of delivery – in respect of her chronic arthritic pains. She is told that such non-emergency healthcare is reserved only to residents of the United Kingdom. Can she claim that, as a migrant Union citizen exercising rights to free movement under Article 18 EC, she is the victim of indirect discrimination contrary to Article 12 EC, which the Member State must now objectively justify? We believe not. Since the benefit is an expression of social solidarity, the claimant’s situation should not be considered comparable to that of members of the relevant community of reference, and the residency requirement would be safe from scrutiny.

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<sup>107</sup> Case C-388/01 *Commission v Italy* [2003] ECR I-721 suggests that, in these cases, the Member State would have to justify the disparate treatment, for instance, by establishing a clear link between contribution through taxation and the relevant benefit.



### **C. Benefits of the Comparability Approach**

Evidently, both the objective justification and the comparability approach acknowledge that, until the Community acquires and exercises more extensive competences in the fields of taxation and social welfare, Union citizenship must be based on the principle of co-existence between the different – and potentially competing – elements of the Union’s multi-level solidarity system. In particular, both models recognise that Member States are entitled to distinguish between own nationals and other lawful residents (on the one hand) and temporary visitors (on the other hand) in cases which presuppose a minimum threshold of belonging before the host community should be asked to assume responsibility for the provision of welfare benefits. Therefore, both approaches help to avoid a situation in which Community law fundamentally challenges basic societal choices which flow from the link binding together members of a solidaristic community; and ensure that the emerging framework of free movement rights and equal treatment for Union citizens does not endanger the financial viability of valuable public services. The main *difference* between the two models lies in the fact that the objective justification approach treats the necessity of a ‘real link’ between claimant and host society as a legitimate defence for indirect discrimination; whilst the comparability approach considers that the absence of such a link is sufficient to exclude the existence of discrimination altogether.

It is true that, since each model is focused on establishing the existence of a ‘real link’, the same factors (such as the nature of the benefit under dispute and its mode of funding, or the claimant’s past and present relationship with the host society) can be relevant in both the objective justification and the comparability approach.

Against that background, the very validity of comparability as a conceptual model has been questioned in the scholarship. For instance, de Búrca has argued that, whilst the comparability approach provides a defence which is substantially equivalent to that available under the objective justification approach, the former has the undesirable effect of enabling Member States to avoid offering a clear articulation of the policy reasons justifying an apparent difference in treatment. Furthermore, the choice between a comparability approach and a justificatory approach affects the burden of proof: in the former case, it is for the claimant to establish the existence of discrimination, and therefore to prove that the two situations are comparable; whereas in the latter case, it is for the defendant Member State to prove that the rules pursue a legitimate policy objective in a proportionate fashion.<sup>108</sup>

Those might well be valid criticisms. Nonetheless, it is important to bear in mind that de Búrca raises them in the context of trade law. In the case of trade restrictions, the aim of liberalisation is clearly sanctioned by the EC Treaty (and the WTO agreement). In this context, it is easier to argue that the onus should fall on the Member State to justify the proportionality of its regulatory standards, once a barrier to movement has been identified. Yet even here, to endorse the objective justification approach, without paying due regard to the need to conduct an *a priori* assessment of the very existence of discrimination, reflects preconceptions about the relative importance of competing policy objectives which are hardly uncontested.<sup>109</sup> This

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<sup>108</sup> G de Búrca, 'Unpacking the Concept of Discrimination in EC and International Trade Law' in C Barnard and J Scott (eds) *The Law of the Single European Market: Unpacking the Premises*, (Hart Publishing 2002).

<sup>109</sup> Consider, eg the problems arising in free movement of goods in relation to (discriminatory) environmental policies. In particular, see Case C-2/90 *Commission v Belgium (Wallonian Waste)* [1992] ECR I-4431, where the Court used the non-comparability approach in a rather artificial way (cf.

problem becomes even more acute in the field of social welfare, where the normative vision for the interplay between the national solidarity systems, as well as the nature and extent of the Union's own social policy ambitions, is much more ambiguous. Here, the postulate of equal treatment – that the temporary visitor is automatically entitled to the same level of solidaristic support as any own national or other lawful resident – challenges too hastily basic assumptions about the allocation of mutual responsibilities between *citizens* and *societies*. By contrast, the comparability approach – as well as avoiding the difficulties inherent in applying the principle of proportionality – seems better equipped to reconcile the effects of Union citizenship with the very notion of a *national* solidaristic community. In particular, focusing more rigorously on the issue of comparability allows us to question the conceptual desirability of superimposing onto the Member States, without more ado, a novel set of binding welfare values based on the assimilation model – a set of values which may not tally with the basic thresholds of belonging which are a defining characteristic of any morally and financially self-sustaining solidarity system.

## VIII. THE IMPACT OF DIRECTIVE 2004/38

How does all this fit in with the relevant provisions of Directive 2004/38,<sup>110</sup> the new regime on free movement for Union citizens adopted by Council and Parliament in spring 2004?

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para 36); and the confused ruling in Case C-379/98 *PreussenElektra AG v Schleswig AG* [2001] ECR I-2099. Further: E Spaventa, 'On discrimination and the theory of mandatory requirements' (2000) 3 *Cambridge Yearbook of European Legal Studies* 457.

<sup>110</sup> Dir 2004/38 on the right of citizens and their family members to move and reside freely within the territory of the Member States, 2004 OJ L158/77.

Article 6 Directive 2004/38 provides that all Union citizens shall enjoy a right of residence for up to three months in any of the Member States ‘without any conditions’.<sup>111</sup> This is the first time that the residency status of Union citizens simply *qua* visitors – and regardless of their economic status – has been codified in secondary legislation.<sup>112</sup> It confirms the view – which, as we have seen, was already evident from the Court’s caselaw – that temporary visitors fall within the personal scope of Article 18 EC on the basis of their right to move freely across the Community. However, whilst Article 6 is phrased in an unconditional fashion, the new regime is not in fact as generous as it seems (or as the Commission’s 2003 revised proposal had suggested). Two caveats have been imposed. First, Article 14 Directive 2004/38 makes retention of even the temporary right of residence expressly conditional upon its beneficiary not becoming an unreasonable burden upon the host society – thus extending the Court’s caselaw beyond long term economically inactive migrants such as *Grzelczyk*, so as also to cover short term economically inactive Union citizens.<sup>113</sup> Secondly, under Article 24 of the Directive 2004/38 – which sets out a general principle of equal treatment for all lawfully resident Union citizens as regards all

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<sup>111</sup> Council and Parliament therefore rejected the Commission’s 2001 / 2003 proposal for a general right to residency of six months’ duration.

<sup>112</sup> Cf. Art 4(2) Dir 73/148, 1973 OJ L172/14 on short term service providers and recipients under Art 49 EC; and caselaw such as Case C-292/89 *ex parte Antonissen* [1991] ECR I-745 on workseekers under Art 39 EC.

<sup>113</sup> Something which is not necessarily appropriate to such short term residents: consider the remarks of AG Geelhoed in Case C-456/02 *Trojani* (Opinion of 19 February 2004; Judgment pending) paras 64-65 Opinion. Indeed, as regards temporary visitors, the steps required to secure expulsion from the national territory may take longer than the claimant’s projected residence (cp. the situation of students as discussed by J-P Lhernould, ‘L’accès aux prestations sociales des citoyens de l’Union européenne’ [2001] *Droit Social* 1103).

benefits falling within the scope of the Treaty – Member States are not obliged to confer entitlement to social assistance during the first three months’ residence of any economically inactive Union citizen.<sup>114</sup> Directive 2004/38 thus allows for the exclusion of any right to equal treatment as regards social assistance for the entire duration of the temporary visitor’s sojourn in the host society pursuant to Article 6.

On that basis, it could be argued that the basic problem analysed in this chapter – that of temporary visitors using their newfound status as migrant Union citizens to gain access to the solidarity benefits of the host society – has been effectively resolved by Directive 2004/38: without having to make any specific choice between the objective justification approach or the comparability model, the Community legislature has simply decreed that temporary residents (i.e. visitors) can be legitimately excluded from the right to equal treatment in relation to social assistance within the host state. Even if the reasoning process is very different, at least the end-result envisaged by Directive 2004/38 seems in keeping with the underlying policy objective – that of preserving the thresholds of belonging and exclusion which define the fundamental characters and preserve the financial balance of the national solidarity systems – which led us to prefer the comparability model over the objective justification approach in our analysis above. All’s well that ends well: should we not be satisfied? If only things were that simple. Further reflection in fact reveals two potential problems with the scheme embodied in Directive 2004/38.

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<sup>114</sup> Not just those relying upon the general three-month right to residency under Art 6 Dir 2004/38; but also longer-term economically inactive residents covered by Art 7 Dir 2004/38. Workseekers with an extended temporary right to residency under Art 14(4)(b) Dir 2004/38 are excluded from equal treatment as regards social assistance throughout the duration of their search for employment: Art 24(2) Dir 2004/38.

The first concerns the meaning of ‘social assistance’. Directive 2004/38 does not offer any precise definition of this term, even though the matter is crucial to the effective operation of Article 24. One possibility would be to look for inspiration from the parallel expression found in Article 4(4) Regulation 1408/71.<sup>115</sup> In the latter context, the Court has construed the term ‘social assistance’ narrowly, so as to cover only means-tested benefits offered by the public authorities on a discretionary basis.<sup>116</sup> If that definition were to be adopted also as regards Directive 2004/38, then we could hardly treat the derogation contained in Article 24 as comprehensive in its attempt to prevent economically inactive Union citizens, relying upon the right of temporary residency under Article 6, from claiming equal treatment as regards welfare benefits and other social services. Apart from the relatively narrow category of discretionary social assistance, temporary visitors would still be entitled to rely on Article 12 EC (and indeed the general principle of equal treatment otherwise referred to in Article 24 Directive 2004/38) to seek access to the host state’s welfare system. And so it would still be necessary for the Court to decide whether to adopt a straightforward objective justification approach (with all the practical and conceptual

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<sup>115</sup> See now Art 3(5) Reg 883/2004 on the coordination of social security systems, 2004 OJ L200/1 (partially repealing and replacing Reg 1408/71).

<sup>116</sup> Consider, eg Case 79/76 *Fossi* [1977] ECR 667. Bear in mind that not every benefit which falls outside the material scope of Reg 1408/71 should automatically be considered ‘social assistance’ within the meaning of Art 4(4): consider, eg benefits granted as of right but which do not relate to one of the specific contingencies listed in Art 4(1) (as in Case 249/83 *Hoeckx* [1985] ECR 982; Case 122/84 *Scrivner* [1985] ECR 1029); and also hybrid benefits (as identified in the Court’s caselaw before the introduction of special non-contributory benefits under Art 4(2a)) where the claimant was not previously subject to the social security legislation of the relevant Member State (as in Case 1/72 *Frilli* [1972] ECR 457; Case C-356/89 *Newton* [1991] ECR I-3017).

problems that would raise); or whether to treat such migrant Union citizens as being in a non-comparable situation to own nationals and other lawful residents (exempting the Member State from any obligation to justify its differential treatment).

However, it seems more likely that the term ‘social assistance’ as used in Article 24 Directive 2004/38 is intended to have its own autonomous meaning, indeed covering any non-contributory welfare benefit or service which would amount to an encumbrance upon the public purse.<sup>117</sup> But this merely leads on to our second potential problem with the new free movement regime. Secondary legislation must conform to and be interpreted in the light of the Treaty (as interpreted by the Court).<sup>118</sup> For these purposes, the judgments in *Grzelczyk* and *Baumbast* fundamentally altered the legal relationship between the Treaty, the Community legislature and the Member States in the field of Union citizenship. All measures which regulate the right to free movement – including Directive 2004/38 – act as limitations and conditions upon the citizen’s fundamental freedom under Article 18 EC; and Member States are required to apply those limitations and conditions in accordance with the general principles of Community law and, in particular, the principle of proportionality. Thus, we are back to square one: whatever the black-letter terms of Article 24 Directive 2004/38, it will remain open to a temporary resident (i.e. visitor) to argue that her / his exclusion from equal treatment as regards

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<sup>117</sup> And, of course, which the claimant does not qualify for *qua* insured person under Reg 1408/71 / Reg 883/2004. Cp. Dir 2003/109 concerning the status of third country nationals who are long term residents, 2004 OJ L16/44: Art 11(1) and (4), read in conjunction with Recital 13 of the Preamble, does not suggest that the Council intended the term ‘social assistance’ to be limited only to discretionary, means-tested benefits.

<sup>118</sup> From innumerable cases, eg Case 41/84 *Pinna* [1986] ECR I on conformity; Case C-114/01 *AvestaPolarit Chrome Oy* [2003] ECR I-0000 on interpretation.

social assistance benefits strikes an unfair balance between, on the one hand, effective enjoyment of the Union citizen's right to free movement and, on the other hand, the Member State's legitimate interest in protecting its welfare system against inequitable claims. The bottom line is that, for so long as the Court is willing to pursue the logic of *Grzelczyk* and *Baumbast*, neither the Community legislature nor the Member States enjoy the competence to dictate that any category of Union citizen should be definitively excluded from enjoying equal treatment as regards any benefit falling within the material scope of the Treaty. And therefore any welfare rule is potentially subject to the scrutiny in terms of proportionality with all the problems that that might entail.

And so, despite the best efforts of Council and Parliament, Directive 2004/38 cannot simply have extinguished the problem of how far temporary visitors are entitled to claim equal treatment with own nationals and other lawful residents when it comes to welfare benefits available within the host territory. As soon as the claimant invokes the reasoning in *Grzelczyk* and *Baumbast*, it will become necessary to look beyond the bare text of Article 24 and ask once again what is the most appropriate doctrinal framework to exclude migrant Union citizens from access to social support from a national solidarity system to which they do not belong: an objective justification approach or the comparability model? But in this regard, the adoption of Directive 2004/38 (while it may not have solved the problem of temporary visitors exactly as its authors intended) does add one more argument for supporting the comparability model over the objective justification approach.

If the Court were eventually to adopt an objective justification approach to temporary visitors who were attempting to overreach the provisions of Directive 2004/38 by reference to the reasoning in *Grzelczyk* and *Baumbast*, then the national



authorities would be required to assess, on a case-by-case basis, why this particular individual should be denied equal treatment as regards social assistance in these particular circumstances. For these purposes, the claimant's case might even seem bolstered by the fact that the safeguard provision contained in Article 14 Directive 2004/38 offers Member States the chance to terminate the right to temporary residency, should application of the principle of equal treatment transform the claimant into an unreasonable financial burden. In such circumstances, one might suppose that the possibility of temporary visitors using the principle of proportionality to access limited welfare benefits within the host society, even during their three months' sojourn and despite the express terms of Article 24 Directive 2004/38, should not be viewed too seriously.

But perhaps the legitimate national interests embodied in Directive 2004/38 go further than this argument would acknowledge. Through the derogation contained in Article 24, Council and Parliament have clearly sought to eliminate *any* risk of welfare tourism. Indeed, the problem is not so much a matter of the claimant becoming an unreasonable burden, but of any claimant being a 'burden' (even if a reasonable one). Thus, Directive 2004/38 recognises that any claim (however small) draws away from the resources which have been allocated to the needs of a given welfare society – by its members, for its members. That is a political statement about the value of belonging to a community of interests, as a precondition to enjoying access to that community's solidaristic support, which we should still strive to accommodate. If the Court were to adopt the view that, when it comes to welfare benefits, temporary visitors are not automatically in a comparable situation with own nationals and other settled residents, then even if the migrant Union citizen were to invoke the principle of proportionality embodied in *Grzelczyk* and *Baumbast*, it would

in the end offer the claimant little assistance: the underlying principle of equal treatment would still not be activated, and the Member State would not be compelled to offer any defence of its differential treatment. By this route, the caselaw on Union citizenship need not have the effect of undermining the delicate compromise reached by Council and Parliament as regards the mutual allocation of responsibilities between the national solidarity systems. Indeed, the comparability model emerges as the most effective way of ensuring that the derogation contained in Article 24 Directive 2004/38 proves effective in practice.

## IX. CONCLUDING REMARKS

When Marshall included social rights alongside civil and political rights in his threefold classification of the entitlements pertaining to national citizenship,<sup>119</sup> perhaps he did not fully foresee how the later twentieth century would witness the gradual disaggregation of those traditional components of national citizenship.<sup>120</sup> Particularly in the Member States of the European Economic Community-turned-European Union, the forces of cross-border migration – facilitated at first by the goal of closer economic integration, then also by the ambition of greater political union – have shown us that it is perfectly possible for foreigners to enjoy extensive expectations of welfare protection within their host society, without necessarily sharing in the political rights and responsibilities which are often reserved to own

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<sup>119</sup> T H Marshall, *Citizenship and Social Class* (CUP, 1949, reprinted Pluto Press, 1991).

<sup>120</sup> As observed by S Benhabib, ‘The Rights of Others: Aliens, Residents and Citizens’, paper presented at *Migrants, Nations and Citizenship*, conference organised by the Centre for Research in the Arts, Social Sciences and Humanities (University of Cambridge, 5-6 July 2004).

nationals.<sup>121</sup> This process reminds us that the concept of social solidarity is not a constant or given, but dynamic and up for renegotiation. In particular, under the influence of Union citizenship, and through the medium of the assimilation model, social solidarity is undoubtedly becoming less statist and more cosmopolitan in its orientation. The question is: just how far can the common identity provided by Union citizenship justify the assimilation of economically inactive migrants into the traditional welfare societies of the Member States? Because, on another view, the primary reference point for social solidarity, linked essentially to national identity, remains relatively resilient and prone to self-assertion – especially when the Member State's own definitions of membership appear to be redefined 'from above' by Brussels and Luxembourg (rather than 'from within' by the domestic experience of social change and political debate).<sup>122</sup>

This fundamental tension is bound to saturate any analysis of how the introduction of Union citizenship has affected the legal status of temporary visitors. Before, under Article 49 EC, such migrants enjoyed only limited rights to equal

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<sup>121</sup> Though even that Marshallian assumption is being increasingly unbundled from the institution of domestic citizenship: consider the voting and candidature rights of migrant Union citizens in municipal and European Parliamentary elections as provided for under Art 19 EC. Also: J Shaw, 'Political Participation of Non-EU Nationals in the EU of 25: Preliminary Observations', paper presented at *Migrants, Nations and Citizenship*, conference organised by the Centre for Research in the Arts, Social Sciences and Humanities (University of Cambridge, 5-6 July 2004).

<sup>122</sup> Though such processes are, of course, far from mutually exclusive: consider German debates in the 1990s over the local voting rights of non-citizens (where domestic considerations of membership and sovereignty interacted with the post-Maastricht Community rules on the electoral rights of Union citizens); as referred to by S Benhabib, 'The Rights of Others: Aliens, Residents and Citizens', paper presented at *Migrants, Nations and Citizenship*, conference organised by the Centre for Research in the Arts, Social Sciences and Humanities (University of Cambridge, 5-6 July 2004).

treatment within the host state under Community law. Now, under Articles 18 and 12 EC, temporary visitors might appear to enjoy much more extensive rights to equal treatment. However, we have argued that Union citizenship should not seek to deconstruct altogether the thresholds of belonging and exclusion underpinning the domestic/national welfare settlement. Otherwise, one would risk substituting a sense of popular acceptance (however tacit) with a sense of widespread alienation for a legal construct which is still perceived as far removed from many individuals' core cultural and emotional ties. The prime objective of Union citizenship should be to create a new model of inclusion which complements rather than replaces existing notions of national citizenship.<sup>123</sup> And for these purposes, we should not pretend that all Union citizens are equal claimants vis-à-vis the national solidaristic community.

What is the most convincing conceptual architecture by which our legal discourse can accommodate this differentiation between Union citizens? The idea of a 'real link' is emerging as the key concept in mediating between rights to equal treatment for migrant Union citizens and the Member State's legitimate interest in protecting its social welfare system. But one key issue which remains to be clarified is how far that concept should play a role *only* in the endgame of an objective justification approach; or (as we have argued) *also* in the elaboration of a more doctrinally rigorous comparability model. By taking comparability between residents and non-residents for granted, the objective justification approach challenges the basic assumption that there is something *unique* about community membership which justifies individual sacrifices for the common good. For this reason, it has been submitted that, when it comes to welfare benefits and services which are an expression of social solidarity by the community towards *its* members, temporary

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<sup>123</sup> Cp. the text of Art 17 EC.

visitors should not automatically be equated to own nationals, lawful residents and others who (by whichever means) manage to establish a persuasive link of belonging to the host society. In practical terms, this might look a little like reinventing the wheel: the temporary visitor *qua* Union citizen can claim equal treatment as regards access to the same sorts of social advantages (such as museum entry fees, criminal injuries compensation, and the conduct of penal proceedings) as she / he could expect *qua* service recipient under Article 49 EC. But reinventing the wheel in this manner became necessary when, first, the Member States created the institution of Union citizenship; then, secondly, the Court of Justice infused that institution with powerful legal potential. And reinventing the wheel in this manner seems entirely appropriate if, whilst accepting the rapid pace of change in our multi-level welfare society, we are to acknowledge not only the financial but also the moral imperatives which continue to lie at the very foundation of European social solidarity.